STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 28, 2012
v	No. 302421 Saginaw Circuit Court
BENNIE MARCOS OLIVER, Defendant-Appellant.	LC No. 09-032924-FH

Before: HOEKSTRA, P.J., and CAVANAGH and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of second degree home invasion, MCL 750.110a(3), conspiracy to commit second degree home invasion, MCL 750.157a, and resisting a police officer, MCL 750.81d(1). We affirm.

Defendant and Enese Dixon were apprehended by police responding to a report that a home invasion was in progress. The home was owned by Andrea Valentine. Upon arrival at the scene, police saw both defendant and Dixon running. Dixon was chased on foot by police, caught, and found to have personal property belonging to Valentine. A police officer drove alongside the running defendant, shouting at him to stop. When defendant continued to run, the police vehicle was used to cut off his progress, and defendant was apprehended. Defendant was also found to have personal property belonging to Valentine. Upon police questioning, defendant stated that he met with five guys at a Quick Stop party store and they went to the subject house to steal things. Defendant claimed that he did not go in the house, but admitted that the other guys came out of the house and gave him stolen items that he accepted and was going to keep. This appeal follows defendant's convictions.

Defendant first argues that he was denied his right to a fair trial by an impartial jury because, during the course of the trial, a juror advised the court that it was difficult to hear. We disagree. Because defendant raises this claim for the first time on appeal, our review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 765-766; 597 NW2d 130 (1999).

The United States and Michigan Constitutions guarantee a criminal defendant a fair trial by an impartial jury. US Const, Am VI; Const 1963, art 1, § 20. Here, at the conclusion of all witness testimony, which took one day, and just before the court was going to excuse the jury for the day, the following exchange between a juror and the court occurred:

> *Juror*: I just wanted to say that a lot of the jurors are saying that it's hard to hear and it's been very difficult for them.
>
> *The Court*: Can we pump up the volume here? We've got a sound system. Is that any better?
>
> *Juror*: Yes. We'll see tomorrow. Everybody pretty much agreed that it was very difficult.
>
> *The Court*: We'll pump up the volume tomorrow.

Defendant argues that he is entitled to a new trial because of this claim that the jury had difficulty hearing. We disagree for several reasons.

First, the above colloquy does not indicate that the jury did not, in fact, hear the evidence presented. Second, it is unclear whether the juror was referring to a difficulty in hearing the attorneys, the witnesses, or the judge. And defendant did not seek any additional clarifying information. Third, at no other time during the trial did a juror indicate an inability to hear, including when the jury was dismissed for a lunch break. Fourth, the record does not reveal that the attorneys, judge, or witnesses experienced any difficulty hearing during the proceeding. Although intolerable acoustic conditions in the courtroom can impair a defendant's right to a fair trial, *People v Vaughn*, 128 Mich App 270, 273; 340 NW2d 310 (1983), no such condition existed in this case. Rather, as in the case of *People v Duff*, 165 Mich App 530, 532-533; 419 NW2d 600 (1987), the record merely supports a conclusion that the jury had some difficulty hearing. Accordingly, defendant has failed to demonstrate that he was denied a fair trial by an impartial jury and plain error warranting reversal was not established.

Next, defendant argues that the trial court abused its discretion when it did not inquire into defense counsel's claim that defendant wanted her to withdraw from the case. We disagree. Because this issue was not presented to or decided by the trial court, our review is for plain error affecting substantial rights. See *Carines*, 460 Mich at 765-766; *People v Herrick*, 277 Mich App 255, 259; 744 NW2d 370 (2007).

Defendant was appointed an attorney who represented him during the preliminary examination and at a plea hearing held immediately before defendant's trial. At the plea hearing, defense counsel briefly advised the court that she presented defendant with the "latest offer" and defendant informed her "that he does not believe I have worked hard enough for him and would like for me to withdraw from his case." The court initially began to question defendant with regard to the claim, but then decided to discuss the status of the plea negotiations. During that discussion defendant agreed to a particular plea that was offered. But during the plea proceeding, MCR 6.302, defendant changed his mind, telling the court that he did not "want to take the plea." Defendant directly addressed the court, stating that he wanted to go to trial. Defendant never advised the court that he was dissatisfied with his appointed counsel, although he had the opportunity to do so.

The trial then proceeded before a different judge, and defendant did not object to his appointed counsel or request substitute counsel before or during the trial. Consequently, based on defendant's silence in spite of the several opportunities that he had to request substitute

counsel, it appears that defendant changed his mind, deciding that he was satisfied with his appointed counsel. However, even if the trial court should have made further inquiry regarding defendant's satisfaction with his appointed counsel, he has failed to establish plain error affecting his substantial rights. See *People v Ginther*, 390 Mich 436, 442; 212 NW2d 922 (1973); *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991).

Next, defendant argues that his Sixth Amendment right to confrontation was violated because he had no right to cross-examine a declarant whose out-of-court statement implicated him as a perpetrator. We disagree.

This purported error occurred during defense counsel's cross-examination of the police officer who chased and caught Dixon. Defense counsel asked the officer whether he saw defendant when he was pursuing Dixon, and the officer replied in the negative. Defense counsel followed up with the question: "So the only time you saw [defendant] was exiting a patrol car at the scene?" The officer replied: "Yes. This was after Mr. Dixon told me that [defendant] was the other subject that was caught." Defense counsel requested that the trial court "strike that," because the answer "was not responsive." The trial court then told the jury to "disregard the last answer." On appeal, for the first time, defendant claims a confrontation clause violation. Thus, our review is for plain error affecting substantial rights. *Carines*, 460 Mich at 765-766.

Both the United States and Michigan Constitutions provide that a criminal defendant has a right to "be confronted with the witnesses against him." US Const, Am VI; Const 1963, art 1, § 20. The Confrontation Clause prohibits the admission of out-of-court testimonial statements unless the declarant was unavailable at trial and the defendant had the prior opportunity for cross-examination. *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004); *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007). The Confrontation Clause applies only to statements used as substantive evidence. *People v Fackelman*, 489 Mich 515, 528; 802 NW2d 552 (2011). A statement is considered testimonial if the primary purpose of the statement or the question that elicits it "is to establish or prove past events potentially relevant to later criminal prosecution." *People v Garland*, 286 Mich App 1, 10; 777 NW2d 732 (2009), quoting *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006). That is, testimonial statements involve "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Fackelman*, 489 Mich at 556, quoting *Crawford*, 541 US at 51-52.

Here, defendant claims that the disputed out-of-court statement is testimonial because Dixon "made a statement to the police which identified [defendant] as participating in the crime." We disagree with defendant's characterization of Dixon's statement to the officer. Dixon's statement to the officer did not implicate defendant "as participating in the crime." While being taken into custody, Dixon merely told the officer that another person, defendant, was also taken into custody. The primary purpose of Dixon's statement was not "to establish or prove past events potentially relevant to later criminal prosecution." *Garland*, 286 Mich App 10, quoting *Davis*, 547 US 822. And Dixon's statement was not "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Fackelman*, 489 Mich at 556. Thus, Dixon's statement was not a testimonial statement and its admission did not violate defendant's Confrontation Clause rights.

However, even if Dixon's statement was testimonial, defendant has failed to establish that its erroneous admission affected the outcome of the trial. See *Carines*, 460 Mich at 765-766. Defense counsel immediately asked for the officer's "non-responsive" testimony to be stricken from the record and the trial court ordered the jury to disregard the testimony. The court also provided a cautionary jury instruction at the conclusion of the trial, stating:

> At times during the trial I've excluded evidence that was offered or stricken testimony that was heard. Do not consider those things in deciding the case. Make your decision only on the evidence that I let in and nothing else.

"Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Here, there is no basis for concluding that the jurors ignored the trial court's instructions. Accordingly, defendant has failed to establish a Confrontation Clause violation entitling him to appellate relief.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello